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14 SUPERIOR COURT OF THE STATE OF CALIFORNIA
15 COUNTY OF LOS ANGELES

16 MANUEL NORIEGA,

17 Plaintiff,

18 vs.

19 ACTIVISION BLIZZARD, INC., a
20 corporation, d/b/a ACTIVISION and
21 TREYARCH, a corporation,

22 Defendants.

CASE NO. BC551747

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' SPECIAL MOTION TO
STRIKE PLAINTIFF'S COMPLAINT
UNDER THE CALIFORNIA ANTI-SLAPP
STATUTE, CIV. PROC. CODE §§ 425.16,
ET SEQ.**

[Notice of Special Motion to Strike and Special
Motion to Strike; Request For Judicial Notice;
Supporting Declarations of Daniel Suarez, Todd
Harvey and Carolyn Hoecker Luedtke; and
[Proposed] Order Filed Concurrently]

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1 **INTRODUCTION**

2 Manuel Noriega was the military dictator of Panama during an especially turbulent period
3 in the history of that country and the region. He was tried and convicted in his home country, as
4 well as in the U.S. and France, for, among other atrocities, murder, drug trafficking, and various
5 human rights violations. Noriega’s ignominious exploits justly earned him multiple prison
6 sentences (including his current incarceration in Panama), along with a well-deserved place of
7 infamy in history’s rogues’ gallery of murderous tyrants.

8 Incredibly, Noriega now claims that his wild misdeeds also earned him the exclusive right
9 under California law to control his depiction in expressive works of art set against the backdrop
10 of his reign. In particular, Noriega asserts that Activision’s critically acclaimed videogame, *Call*
11 *of Duty: Black Ops II* (“*Black Ops II*”), violates his purported “right of publicity,” because a
12 Noriega character appears in a small portion of the game’s fictionalized depiction of undercover
13 missions in Panama and elsewhere in Central America during the late 1980s.

14 Noriega’s claims are audacious. If credited, they would give numerous historical and
15 political figures—as well as their heirs—a veto right over their appearance in imaginative works
16 of art set in historical contexts. That veto right would cover not only videogames, but other
17 constitutionally protected works, including movies, TV shows, and books (such as *Forrest Gump*,
18 *Saturday Night Live* and *Ragtime*, to name just a few).

19 Fortunately, neither California law nor the First Amendment allows such an absurd and
20 destructive extension of the right of publicity. Because Noriega’s suit unquestionably targets
21 protected expression, *Brown v. Entm’t Merchs. Ass’n* (2011) 131 S.Ct. 2729, 2733, California’s
22 anti-SLAPP statute provides the grounds for striking Noriega’s claims and ending his case now.

23 **Noriega’s First Claim—for Violation of the Statutory and Common Law Right of**
24 **Publicity—Cannot Succeed.** Neither California law nor the First Amendment allows historical
25 figures to censor their depiction in history under the guise of a publicity claim. In our system of
26 free expression, history does not belong to those who make it; their role belongs to history. The
27 California Supreme Court has recognized that right-of-publicity claims can be cognizable where,
28 like copyrights, they are justifiable attempts to reward the creative labor that makes a celebrity

1 famous. That is not this case. Noriega’s notoriety stems from his role in major historical events,
2 not from any creative labor. Even if Noriega in theory had a protectable publicity interest, his
3 claim under the “transformative use” test still fails. *Comedy III Prods., Inc. v. Gary Saderup, Inc.*
4 (2001) 25 Cal.4th 387, 404 (“*Comedy III*”).

5 **Noriega’s Second Claim—for Unjust Enrichment—Cannot Succeed.** California law
6 does not recognize such a cause of action, and Noriega has no equitable claim for restitution.

7 **Noriega’s Third Claim—for Unfair Competition—Cannot Succeed.** Finally, Noriega
8 alleges that Activision violated Business and Professions Code section 17200 (“UCL”),
9 purportedly because the appearance of the Noriega character in the game—as a dictator, double-
10 crosser, and accessory to murder—fools consumers into believing that Noriega endorsed the
11 game. Noriega cannot prove such an outlandish theory.

12 STATEMENT OF FACTS

13 The following facts are set forth in the accompanying Declarations (“Decl.”) of Daniel
14 Suarez, Todd Harvey, and Carolyn Hoecker Luedtke, and Request for Judicial Notice (“RJN”),
15 filed concurrently with this motion.¹

16 I. ACTIVISION’S *CALL OF DUTY* FRANCHISE AND THE *BLACK OPS II* GAME

17 Released in 2012, *Black Ops II* is part of Activision’s award-winning *Call of Duty*
18 franchise, a series of games in which players assume the role of soldiers carrying out various
19 missions. Suarez Decl. at ¶¶ 3-4, 24.² Players control soldiers from the first-person point of view
20 and experience gameplay “through the eyes” of their characters. *Id.* at ¶¶ 4-8. Activision
21 released the first *Call of Duty* in 2003, followed by *Call of Duty 2* in 2005 and *Call of Duty 3* in
22 2006. *Id.* at ¶ 11. All three games are set in the European Theater of World War II, where
23 players assume the roles of, among others, an American Private storming the beaches of
24 Normandy and a British Sergeant fighting in the Second Battle of El Alamein. *Id.* at ¶¶ 11-12.

25
26 _____
27 ¹ See Code Civ. Proc. § 425.16(b)(2) (“the court shall consider the pleadings, and supporting and
opposing affidavits stating the facts upon which the liability or defense is based.”).

28 ² A copy of the game is attached to the Luedtke Declaration as Exhibit 19.

1 Between 2006 and 2010, Activision released four other major *Call of Duty* games with
2 new features. For example, *Call of Duty 4: Modern Warfare*, released in 2007, was the first set in
3 a contemporary timeframe and entirely fictional setting, namely, a fictional, oil-rich Middle
4 Eastern kingdom. Suarez Decl. at ¶ 13. Similarly, *Call of Duty: World at War*, released in 2008
5 and set in World War II’s Pacific Theater, introduced historical figures and interspersed cinematic
6 video sequences with the gameplay—including scenes of Franklin Roosevelt’s “Day of Infamy”
7 speech and Japanese Emperor Hirohito. *Id.* at ¶¶ 14-16 & Ex. A.

8 In 2010, Activision released the first *Black Ops* installment of *Call of Duty*, which was set
9 against the backdrop of the Cold War. Suarez Decl. at ¶¶ 17-18. Players control American
10 special forces operative Alex Mason who, along with fellow operative Frank Woods and their
11 CIA handler Jason Hudson, leads a series of missions to thwart Soviet chemical attacks. *Id.* at
12 ¶¶ 18, 22-23. Several missions are fictionalized versions of real events and depict historical
13 figures. One mission reimagines the 1961 Bay of Pigs invasion as a diversion from an operation
14 to assassinate Fidel Castro. *Id.* at ¶ 18. *Black Ops* also includes a “Zombie” mode in which
15 players can assume the roles of John F. Kennedy, Richard Nixon, and Robert McNamara to fight
16 zombies in the Pentagon basement. *Id.* at ¶¶ 20-21 & Ex. A.

17 *Black Ops II* continues the series’ highly imaginative tradition and includes audiovisual
18 storytelling comparable in production quality and appearance to a motion picture. Suarez Decl. at
19 ¶ 25. The game’s story was co-written by David Goyer, an acclaimed screenwriter whose credits
20 include the *Batman* trilogy. *Id.* Grammy- and Oscar-winner Trent Reznor wrote the game’s
21 theme song. *Id.* Notable actors such as Michael Keaton voice the primary characters. *Id.*

22 Fictional characters Mason, Woods and Hudson return in *Black Ops II* with a new goal:
23 to track and capture Raul Menendez, a fictional narcoterrorist. Suarez Decl. at ¶¶ 32, 36. The
24 missions take place in two alternating time frames. *Id.* at ¶¶ 31-33. The first is set in the 1980s,
25 as players again control Alex Mason in missions connected to Menendez’s role as an arms and
26 drug trafficker in conflict “hot spots” of that time—not only in Panama but also in Afghanistan
27 and Angola. *Id.* at ¶¶ 32, 36. The story’s other sequence is set in 2025, where players control
28 Mason’s son David in missions to thwart Menendez’s efforts to foster war between the U.S. and

1 China. *Id.* at ¶¶ 33-35. One of these futuristic missions features the character of former CIA
2 Director David Petraeus and a United States naval vessel named the *U.S.S. Barack Obama*. *Id.* at
3 ¶¶ 33, 35 & Ex. A.

4 **II. MANUEL NORIEGA AND THE NORIEGA CHARACTER IN *BLACK OPS II***

5 Manuel Noriega’s historical exploits are well known. RJN at 8-9; Luedtke Decl. at ¶¶ 20-
6 21 & Exs. 20-21. He seized command over the Panamanian military in the early 1980s and
7 exercised dictatorial control over the country until 1989. RJN at 5-7; Luedtke Decl. at ¶ 17 & Ex.
8 17. His rule was widely known for drug- and arms-trafficking, money-laundering, corruption,
9 election-rigging and violence against political opponents. Luedtke Decl. Ex. 17. In 1988, a
10 federal grand jury indicted Noriega on drug, money laundering and racketeering charges
11 stemming from his involvement with the Medellin drug cartel in Colombia. *Id.* When Noriega
12 refused to accept his chosen candidate’s defeat in the 1989 elections, the first President Bush
13 ordered an invasion of Panama—Operation Just Cause. RJN at 5-7; Luedtke Decl. at ¶ 18 & Ex.
14 18. After sustaining hundreds of casualties, American forces cornered Noriega, who took refuge
15 in the Vatican Embassy in Panama City. Luedtke Decl. Ex. 18. Noriega surrendered after several
16 days of a nationally televised standoff. *Id.*

17 In 1992, a jury convicted Noriega of narcotics trafficking and racketeering. *United States*
18 *v. Noriega* (11th Cir. 1997) 117 F.3d 1206. He was sentenced to 40 years in prison. *Id.* In the
19 meantime, Noriega was convicted in Panamanian courts of murdering political opponents and in a
20 French court of laundering drug profits. *Noriega v. Pastrana* (11th Cir. 2009) 564 F.3d 1290. In
21 2010, Noriega was extradited to France to serve his sentence there. *Id.* In 2011, France
22 extradited Noriega to Panama, where he remains imprisoned to this day.

23 *Black Ops II* depicts a Noriega character that was created using motion capture technology
24 to record an actor. Suarez Decl. at ¶¶ 38, 45-46. The character appears in two of the game’s 11
25 missions—both set against the turbulence of 1980s’ Central America—which are part of
26 “campaign” mode, the least popular of the three modes for playing the game. *Id.* at ¶¶ 27-30, 40.
27 The character is not in the other two modes at all. *Id.* Players cannot assume the role of the
28 Noriega character in either mission. *Id.* at ¶ 40. Nor does either mission depict (or purport to

1 depict) things Noriega actually said or did. Quite the contrary. In the first mission, the Noriega
2 character leads Panamanian military and American special forces to capture the fictional
3 Menendez at his compound in Nicaragua. *Id.* at ¶¶ 39, 41. The Noriega character appears for less
4 than a minute and only in the cinematic videos accompanying the mission’s gameplay. *Id.* at
5 ¶ 41. In the other mission, set in 1989 during Operation Just Cause, Mason leads special forces
6 that capture the Noriega character at a motel in Panama City. *Id.* at ¶¶ 42-44 & Ex. A. However,
7 Mason’s team takes the Noriega character to a building rooftop for a prisoner exchange, not to
8 Miami for trial. *Id.* at ¶ 43. These fictional events involving the Noriega character constitute
9 only a small part of the overall *Black Ops II* game. *Id.* at ¶¶ 40-42.

10 None of Activision’s more than 40 marketing trailers for the game depict Noriega. *See*
11 Harvey Decl. at ¶ 5. And consumers do not see Noriega’s character as a focus of the game. None
12 of the 1,558 reviews of *Black Ops II* on the website Metacritic, a leading Internet gaming forum,
13 mention Noriega. Luedtke Decl. at ¶ 22.

14 ARGUMENT

15 An anti-SLAPP motion is a two-step process: [1] the defendant must make a threshold
16 showing that each challenged cause of action arises from protected activity in connection with a
17 public issue. The focus is not on “the form of the plaintiff’s cause of action,” but on “the
18 defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity
19 constitutes protected speech or petitioning.” *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92
20 (emphasis in original). [2] Following that showing, the plaintiff must demonstrate a probability
21 of prevailing on his claim. *Mattel, Inc. v. Luce, Forward, Hamilton & Scripps* (2002) 99
22 Cal.App.4th 1179, 1188. The plaintiff “must demonstrate that the complaint is *both* legally
23 sufficient *and* supported by a sufficient prima facie showing of facts to sustain a favorable
24 judgment.” *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (emphasis added)
25 (internal citations omitted). If the plaintiff fails to satisfy his burdens, the Court must strike the
26 cause of action. Code Civ. Proc. § 425.16(b)(1).

1 **III. STEP ONE: ALL OF NORIEGA’S CLAIMS ARE BASED ON PROTECTED**
2 **ACTIVITY IN CONNECTION WITH A PUBLIC ISSUE—THE APPEARANCE**
3 **OF THE NORIEGA CHARACTER IN A CONSTITUTIONALLY PROTECTED**
4 **ARTISTIC VIDEOGAME DEALING WITH HISTORICAL MATTERS**

5 It is firmly established that videogames—like movies, books and other expressive
6 works—are fully protected by the First Amendment. *Brown*, 131 S.Ct. at 2733. Unsurprisingly,
7 courts are unanimous that legal claims based on the appearance of characters in videogames
8 satisfy the first step of the anti-SLAPP inquiry. *See, e.g., Kirby v. Sega of Am., Inc.* (2006) 144
9 Cal.App.4th 47, 61 (claim based on use of likeness in videogame satisfies step one).

10 Each of Noriega’s claims is “based on” protected expression in games that involve issues
11 of public interest. *Brenton v. Metabolife Int’l, Inc.* (2004) 116 Cal.App.4th 679, 685.³ Noriega’s
12 right-of-publicity claim is that “Defendants used” his “name, image, and likeness” in *Black Ops II*
13 “without [his] or his representative’s permission, consent, or authorization.” Compl., ¶ IV.3. His
14 unjust enrichment claim is that “Defendants appropriated” his “image and likeness” in *Black Ops*
15 *II. Id.*, ¶ V.3. And his UCL claim is that “Defendants have deceived and confused the public into
16 believing that Plaintiff authorized, approves, and endorses the use of its name and likeness in
17 BLACK OPS II.” *Id.*, ¶ VI.2. The anti-SLAPP statute applies to Noriega’s claims, and Noriega
18 has the burden to demonstrate a probability of prevailing on the merits.

19 **IV. STEP TWO: NORIEGA CANNOT DEMONSTRATE A PROBABILITY THAT HE**
20 **WILL PREVAIL ON ANY OF HIS CLAIMS**

21 **A. Noriega’s Right-of-Publicity Claims Cannot Succeed**

22 The First Amendment bars Noriega’s common law and statutory right-of-publicity claims.
23 California courts (and federal courts evaluating claims under California law) have evaluated the
24 First Amendment issues in a series of right-of-publicity cases brought by celebrities— *i.e.*, people
25 “famous for being famous”—using the “transformative use” test. *Hilton v. Hallmark Cards* (9th
26 Cir. 2010) 599 F.3d 894, 899. That test asks whether “the state law interest in protecting *the*
27 *fruits of artistic labor* outweighs the expressive interests of the imitative artist,” and in particular,

28 ³ There is an obvious public interest in, among other things, the historical contexts of Panama, Central America, and the other “hot spots” of the late 1980s that the game depicts, as well as in creative works about the deployment of U.S. special forces in foreign countries.

1 whether the defendant’s depiction of the plaintiff is the “very sum and substance of the work in
2 question.” *Comedy III*, 25 Cal.4th at 405 (emphasis added).

3 Noriega’s claims fail under that standard—if the Court reaches the issue. But Noriega’s
4 claims fail under a more fundamental First Amendment bar. Noriega is not a celebrity, and he is
5 not even a private person whose image has been used by another. Noriega is a historical figure of
6 great importance to a particular time (the late 1980s) and place (Panama and Central America).
7 RJN at 8-9; Luedtke Decl. at ¶¶ 20-21 & Exs. 20-21. Creators of artistic and expressive works
8 are free to use names and likenesses of such figures as a way of expressing historical context and
9 those persons’ role in history. Even if the Court applies the transformative use test, however,
10 Noriega’s claims clearly fail. Section IV.A.2, *infra*.

11 **1. The First Amendment Bars Noriega’s Attempt to Censor Creative**
12 **Depictions of His Place in Historical Matters of Public Interest**

13 More than three decades ago, in *Gugliemli v. Spelling—Goldberg Prods.* (1979) 25 Cal.3d
14 860, a majority of the California Supreme Court recognized that historical figures cannot use the
15 right of publicity to censor fictional accounts of their place in history. In *Gugliemli*, the Court
16 held that Rudolph Valentino’s heirs had no such common law claim based on a TV movie that
17 presented a fictional version of his life. The Court’s short order cited the rule (announced the
18 same day in a different case) that the common law right is not descendible. *Id.* at 861. However,
19 Chief Justice Bird’s concurring opinion, joined by three other Justices (one of whom stated his
20 concurrence separately), explained that the right of publicity does not protect the use of historical
21 figures to provide context to fictional works:

22 Contemporary events, symbols and people are regularly used in fictional works.
23 Fiction writers may be able to more persuasively, or more accurately, express
24 themselves by weaving into the tale persons or events familiar to their readers.
25 The choice is theirs. No author should be forced into creating mythological worlds
26 or characters wholly divorced from reality Surely, the range of free
27 expression would be meaningfully reduced if prominent persons in the present and
28 recent past were forbidden topics for the imaginations of authors of fiction.

26 *Gugliemli*, 25 Cal. 3d at 869 (Bird, C.J., concurring). *See Comedy III*, 25 Cal.4th at 396 n. 7
27 (recognizing that concurrence’s views “commanded the support of the majority of the court”).

1 The opinion explained that Valentino’s “lingering persona” was “an apt topic for poetry or
2 song, biography or fiction.” *Id.* at 870. It concluded that, so long as the defendant’s use of
3 Valentino’s persona was not (1) “wholly unrelated to” him or his role in history, or (2) used “to
4 promote or endorse a collateral commercial product,” the First Amendment barred the right of
5 publicity claim. *Guglielmi*, 25 Cal. 3d at 865 n.6 (Bird, C.J., concurring).

6 Activision’s use of Noriega’s “lingering persona” in *Black Ops II* falls squarely within
7 these protections. The use directly illustrates Noriega’s role in the history of his country and the
8 Central American region in a creative work of art. Suarez Decl. at ¶¶ 38-44 & Ex. A. And the
9 use is non-commercial, *i.e.*, it does not “propose a commercial transaction.” *Hoffman v. Capital*
10 *Cities/ABC, Inc.* (9th Cir. 2001) 255 F.3d 1180, 1183-84. As such, the use is fully protected by
11 the First Amendment. *See Seale v. Gramercy Pictures* (E.D. Pa. 1996) 949 F. Supp. 331, 337
12 (First Amendment barred publicity claim by Bobby Seale for portrayal in film that “integrates
13 fictitious people and events with the historical people and events surrounding the emergence of
14 the Black Panther Party”); *Hicks v. Casablanca Records* (S.D.N.Y. 1978) 464 F. Supp. 426, 433
15 (same as to film of fictional account of Agatha Christie’s life). We are not aware of any case
16 holding that a creative work’s use of a historical figure’s name or likeness to illustrate his place in
17 history supports a right-of-publicity claim consistent with the First Amendment.

18 Were the law otherwise, “the creation of historical novels and other works inspired by
19 actual events and people would be off limits to the fictional author. An important avenue of self-
20 expression would be blocked and the marketplace of ideas would be diminished.” *Guglielmi*, 25
21 Cal. 3d at 872 (Bird, C.J., concurring). Just as Noriega, Petraeus, Kennedy, Nixon and Castro
22 appear in *Black Ops* games, so Harry Houdini, J.P. Morgan, Henry Ford and Archduke Franz
23 Ferdinand appear in *Ragtime*, E.L. Doctorow’s novel about three American families in the early
24 1900s that was adapted into a Tony Award-winning musical. Luedtke Decl. ¶ 11 & Exs. 10-11.
25 Likewise, Woody Allen won an Oscar for his screenplay for *Midnight in Paris* in which the
26 protagonist encounters Hemingway, F. Scott Fitzgerald, Matisse, and others landmark personas of
27 1920s’ Paris. *Id.* at ¶ 2 & Ex. 1. Accepting Noriega’s claim that a historical figure cannot be
28

1 portrayed without his consent would chill these and countless other works—from *Bill and Ted’s*
2 *Excellent Adventure* to *Girl With a Pearl Earring*. See *id.* at ¶¶ 2-10, 12-16 & Exs. 2-9, 12-16.

3 The transformative use test applies to a very different claim—that the defendant’s “artistic
4 expression takes the form of a literal depiction or imitation of a celebrity for commercial gain . . .
5 without adding significant expression”—with a very different justification—that “the state law
6 interest in protecting *the fruits of artistic labor* outweighs the expressive interests of the imitative
7 artist.” *Comedy III*, 25 Cal.4th at 405 (emphasis added). Accord *Zacchini v. Scripps-Howard*
8 *Broad. Co.* (1977) 433 U.S. 562, 576-77 (discussing state’s interest in protecting “*the*
9 *entertainer’s* incentive in order to encourage the production of *this type of work*”—the “same
10 consideration” that “underlies the patent and copyright laws”) (emphasis added).⁴ As the
11 California Supreme Court explained:

12 The right of publicity, like copyright, protects a form of intellectual property that
13 society deems to have some social utility. Often considerable money, time and
14 energy are needed to develop one’s prominence in a particular field. Years of
15 labor may be required before one’s skill, reputation, notoriety or virtues are
sufficiently developed to permit an economic return through some medium of
commercial promotion.

16 25 Cal.4th at 399 (quotation marks omitted).

17 Noriega’s claims have nothing to do with vindicating “fruits of artistic labor” or any other
18 activity with “some social utility.” Noriega did not build the image he claims the power to
19 control through any “artistic labor.” His notoriety stems entirely from his role in widely known
20 historical events as a dictator and convicted criminal. Noriega does not own this history any more
21 than the first President Bush owns portrayals of him or his decision to order Operation Just Cause.

22 That the Court should not reach the transformative use test is illustrated by a court of
23 appeal decision decided soon after *Comedy III*. In *Gionfriddo v. Major League Baseball* (2001)
24 94 Cal.App.4th 400, the court held that former pro baseball players could not prohibit Major
25 League Baseball from using photos and footage of “historic events from long ago”—“fragments
26

27 ⁴ *Cardtoons, L.C. v. Major League Baseball Players Ass’n* (10th Cir. 1996) 95 F.3d 959, 973
28 (“principal economic argument” supporting publicity right “is that it provides an incentive for
creativity and achievement.”); *Matthews v. Wozencraft* (5th Cir. 1994) 15 F.3d 432, 437 (same).

1 from baseball’s mosaic”—to create entertainment for baseball fans. *Id.* at 410. As in *Gugliemli*,
2 the court reasoned that “the public is . . . entitled to be informed and entertained about our
3 history.” *Id.* at 411 (citing *Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 543) (surfers
4 did not have right-of-publicity claim in connection with surfing “documentary about a certain
5 time and place in California history and, indeed, in American legend”; surfers “part of that era”
6 had “contributed, willingly or unwillingly, to the development of a lifestyle that has become
7 world-famous and celebrated in popular culture.”).⁵ The same considerations make clear that the
8 Court need not reach the transformative use test to reject Noriega’s claims.

9 **2. If the Court Reaches the Transformative Use Test, the First**
10 **Amendment Bars Noriega’s Right of Publicity Claims**

11 **(a) *Black Ops II’s Use of a Noriega Character is Transformative***

12 The touchstone of the transformative use test is “whether the celebrity likeness is one of
13 the ‘raw materials’ from which an original work is synthesized, or whether the depiction or
14 imitation of the celebrity is the very sum and substance of the work in question.” *Comedy III*, 25
15 Cal.4th at 406. If “a product containing a celebrity’s likeness is so transformed that it has become
16 primarily the defendant’s own expression rather than the celebrity’s likeness,” the First
17 Amendment bars any right-of-publicity claim. *Id.*⁶

18 While this standard is “in a sense more qualitative than quantitative,” the Court has
19 identified one guidepost as particularly “useful”: “does the marketability and economic value of
20 the challenged work derive primarily from the fame of the celebrity depicted?” *Comedy III*, 25
21 Cal.4th at 407. If not, “then there would generally be no actionable right of publicity.” *Id.* A
22 series of California cases make clear that Activision’s use is transformative.

23 For example, in *Winter v. DC Comics* (2003) 30 Cal.4th 881, the Supreme Court held that
24 the First Amendment preempted a claim by the Winter brothers. These well-known recording
25 artists alleged that DC Comics used their likenesses to depict a set of “half-human and half-

26 ⁵ For these reasons, the “public interest” exception discussed in both *Gionfriddo* and *Dora* also
bars Noriega’s common law and statutory claims. *See also* n.3, *supra*.

27 ⁶ The focus is not on the representation of the likeness itself but on the work as a whole: “[W]hen
28 we use the word ‘expression,’ we mean expression of something other than the likeness of the
celebrity.” *Comedy III*, 25 Cal.4th at 406.

1 worm” brothers in only two of five volumes of a “larger story” involving an “outlandish plot.”
2 *Id.* at 886, 890. The Court held that the Winters’ images were “merely part of the raw materials
3 from which the comic books were synthesized.” *Id.* at 890. The court in *Kirby* reached the same
4 result with a respect to a videogame character allegedly based on the singer Keirin Kirby of the
5 band Deee-Lite. The court cited three reasons why Sega’s depiction of the character was
6 transformative: (1) the game was set in the 25th Century; (2) the “computer-generated physique
7 is dissimilar from Kirby’s”; and (3) the dance moves were “unlike Kirby’s movements in any of
8 her music videos.” 144 Cal. App. 4th at 616. In short, the game depicted fictional conduct in a
9 fictional setting.

10 *Ross v. Roberts* (2013) 222 Cal.App.4th 677, is also closely on point. Plaintiff Ricky D.
11 Ross was an imprisoned “former criminal who achieved some sort of celebrity status due, in part,
12 to the enormous scale of his cocaine-dealing operations,” which were connected to the Iran-
13 Contra affair. *Id.* at 680-81. From prison, Ross brought a right-of-publicity claim against the
14 rapper Rick Ross, whose “lyrics frequently include fictional stories about running large-scale
15 cocaine operations,” including a phrase that plaintiff himself used in the media. *Id.* at 682. The
16 court held that the music was transformative because, rather than “seeking to profit solely off the
17 name and reputation of Rick Ross,” the defendant “made music out of fictional tales of dealing
18 drugs and other exploits—some of which related to plaintiff.” *Id.* at 687. That is, “[u]sing the
19 name and certain details of an infamous criminal’s life as basic elements, he created original
20 artistic works.” *Id.* at 687-88.

21 *Black Ops II*’s use of the Noriega character is plainly transformative under this precedent.
22 First, “the marketability and economic value” of *Black Ops II* do not “derive primarily from”
23 Noriega’s “fame.” *Comedy III*, 25 Cal.4th at 407 (emphasis added). See *Ross*, 222 Cal. App.4th
24 at 688. As in *Winter*, the Noriega character plays a minor role in *Black Ops II*. Suarez Decl. at
25 ¶¶ 40, 44. The character appears in only two of 11 single player campaign missions and not at all
26 in the game’s two most popular modes. *Id.* at ¶¶ 27-30, 40. Even in single player mode,
27 Noriega’s appearance is a small part of a “larger story,” *Winter*, 30 Cal.4th at 890, that centers on
28 the Masons’ and Hudson’s fictional missions to capture the fictional Menendez. Suarez Decl. at

1 ¶¶ 30-37, 41-44 & Ex. A. *See ETW Corp. v. Jireh Pub., Inc.* (6th Cir. 2003) 332 F.3d 915, 938
2 (painted collage of images of golfers, including Tiger Woods, and golf events, was transformative
3 of Woods’s image); *Comedy III*, 25 Cal. 4th at 408-09 (Andy Warhol silkscreens of iconic figures
4 “may well be” protected by First Amendment). Further, none of Activision’s marketing for *Black*
5 *Ops II* features the Noriega character. *See* Harvey Decl. at ¶¶ 3-6. For that reason as well,
6 Noriega’s statutory claim fails because his name and likeness were not used “for purposes of
7 advertising or selling, or soliciting purchases of, products, merchandise, goods or services.” Cal.
8 Civ. Code § 3344(a).⁷

9 *Second*, the Noriega character—like the larger storyline—partakes in fictional events in
10 fictional settings. Noriega never personally led Panamanian military forces in Nicaragua for any
11 reason, let alone in conjunction with American special forces to capture drug traffickers he was
12 imprisoned for assisting. The mission depicting Noriega’s capture also departs from real life. He
13 was not captured in a motel, but rather surrendered from the Vatican Embassy. He was brought
14 to trial in Miami, not used in a prisoner exchange. *See Ross*, 222 Cal. App.4th at 687-88.

15 *Third*, the minor use of the Noriega character in no way is the “very sum and substance
16 of” *Black Ops II*. *Comedy III*, 25 Cal.4th at 406. Rather, the Noriega character is a “fictionalized
17 portrayal” which the California Supreme Court identified as one of “the transformative elements
18 or creative contributions that require First Amendment protection.” *Id.*

19 **(b) No Doubt and Keller Do Not Save Noriega’s Claim**

20 Noriega appears to base his claim on *No Doubt v. Activision Publ’g, Inc.* (2011) 192
21 Cal.App.4th 1018, and *In re NCAA Student-Athlete Name & Likeness Licensing Litig.* (9th Cir.
22 2013) 724 F.3d 1268 (“*Keller*”). Neither case adopts Noriega’s extreme contention that, if he is
23 “recognizable” in a work, Compl., ¶ IV.4, that fact alone renders the work not transformative.

24
25 _____
26 ⁷ *See Brewer v. Hustler Magazine, Inc.* (9th Cir. 1984) 749 F.2d 527, 530 (statute did not apply to
27 use of plaintiff’s photograph only within sexually explicit magazine); *Johnson v. Harcourt,*
28 *Brace, Jovanovich, Inc.* (1974) 43 Cal. App. 3d 880, 895 (article appearing only inside textbook
was not “so ‘directly’ connected with the sale of the textbook that it falls within” statute).

1 In *No Doubt*, the court sustained a right-of-publicity claim against an anti-SLAPP
2 challenge. The band No Doubt had licensed Activision to use their members' likenesses and
3 some songs in the *Band Hero* videogame. The game enabled players to "be' the No Doubt rock
4 stars." *No Doubt*, 192 Cal.App.4th at 1033. As the court described the facts, No Doubt
5 participated in creating "computer-generated recreations" ("avatars") "of the real band members,
6 painstakingly designed to mimic their likenesses" so that players assumed the role of "exact
7 depictions of No Doubt's members doing exactly what they do as celebrities." *Id.* at 1033-34.
8 The court said that No Doubt was depicted as one would expect of an effort "to encourage[] the
9 band's sizeable fan base to purchase the game so as to perform as, or alongside the members of
10 No Doubt." *Id.* at 1035. Although No Doubt licensed their use in the game, the band objected to
11 avatars performing songs the band did not license and said it would never have performed. *Id.* at
12 1024. The court held the game was not transformative because, in the court's view, "the graphics
13 and other background content of the game are secondary, and the expressive elements of the
14 game remain manifestly subordinated to the overall goal of creating a conventional portrait of
15 [No Doubt] so as to commercially exploit [its] fame." *Id.* at 1035 (quotation marks omitted).

16 Activision's depiction of Noriega in *Black Ops II* is the other way around from the court's
17 description of the facts in *No Doubt*. Noriega's fictional portrayal is "secondary" and "manifestly
18 subordinated" to the "overall goal" of telling—and letting players participate in—a wider
19 fictional narrative that centers on Hudson, the Masons and Menendez, not Noriega. Unlike in *No*
20 *Doubt*, Noriega is not a character whom players control in the game; the character is a small part
21 of the fictional world of gameplay. Suarez Decl. at ¶¶ 40-42. The character in no way is the
22 game's "sum and substance," and Noriega cannot show that he has a "fan base" that would
23 purchase the game for the Noriega character, particularly given the character's absence from the
24 game's promotional materials and online reviews.

25 As Noriega himself alleges, his character's appearance—like that of the Kennedy, Nixon,
26 Castro, McNamara and Petraeus characters—simply adds historical flavor: Activision "features
27 several non-fiction characters, including Plaintiff, for one purpose: to heighten realism of its
28 videogame". Compl., ¶ I.6. See also Suarez Decl. at ¶¶ 38-40. *Black Ops II* is indistinguishable

1 in that respect from countless other artistic works of historical fiction protected by the
2 Constitution.

3 The Ninth Circuit called *Keller* “very similar to” *No Doubt*, 724 F.3d at 1276, and the case
4 is inapposite for similar reasons. Unlike in *Black Ops II*, in the *NCAA Football* videogame at
5 issue there, “users manipulate the characters in the performance of the same activity for which
6 they are known in real life” and in a “realistic” context, including “real venues” where college
7 football players play. *Id.* Here, the Noriega character plays a supporting role in a fictional story
8 about fictional characters. Activision’s depiction of Noriega is transformative and thus protected.

9 **B. California Law Does Not Recognize Noriega’s Claim for Unjust Enrichment**

10 Noriega’s second cause of action is styled “Unjust Enrichment,” but that “is not a cause of
11 action, just a restitution claim.” *Hill v. Roll Int’l Corp.* (2011) 195 Cal.App.4th 1295, 1307;
12 *Levine v. Blue Shield of Cal.* (2010) 189 Cal.App.4th 1117, 1138. To the extent that Noriega tries
13 to justify this cause of action as a claim for restitution based on his right-of-publicity claim, the
14 claim fails for all of the reasons that apply to his first cause of action. In addition, unjust
15 enrichment is equitable in nature. Noriega has no interest (equitable or otherwise) in the proceeds
16 of a videogame that permissibly depicts a Noriega character as part of the historical context.

17 **C. Noriega’s UCL Claim Cannot Succeed**

18 Finally, Noriega alleges a “fraudulent business practice” claim under the UCL. He asserts
19 that “Defendants have deceived and confused the public into believing that [Noriega] authorized,
20 approves, and endorses the use of its name and likeness in BLACK OPS II.” Compl., ¶ VI.2.
21 Noriega cannot prevail on this claim, as he cannot show that the use “explicitly misleads”
22 consumers. *See E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.* (9th Cir. 2008) 547 F.3d 1095.

23 The UCL’s fraud prong, like trademark law, is designed to deter and remedy instances of
24 “consumer confusion,” *i.e.*, conduct that “dupes” customers “into buying a product they
25 mistakenly believe is sponsored by” the plaintiff. *Mattel, Inc. v. MCA Records, Inc.* (9th Cir.
26 2002) 296 F.3d 894, 900. Hence, the First Amendment limitation on trademark should apply to
27 UCL claims alleging fraudulent endorsement. *See E.S.S. Entm’t 2000*, 547 F.3d at 1099-1100
28 (First Amendment preempted UCL claim alleging false endorsement). The First Amendment

1 limitation derives from *Rogers v. Grimaldi* (2d Cir. 1989) 875 F.2d 994, which holds that false-
2 endorsement liability applies only where use of the claimed intellectual property “has no artistic
3 relevance to the underlying work whatsoever, or, if it has some artistic relevance” only if it
4 “explicitly misleads as to the source or the content of the work.” *E.S.S. Entm’t 2000*, 547 F.3d at
5 1099 (quoting *Rogers*, 875 F.2d at 999).

6 Noriega cannot meet either part of this test. Noriega does not and cannot dispute that the
7 Noriega character has artistic relevance to *Black Ops II*. Noriega also cannot show that *Black*
8 *Ops II* “explicitly misleads” consumers as to the “source or content” of the game. “To be
9 explicitly misleading, a defendant’s work must make some affirmative statement of the plaintiff’s
10 sponsorship or endorsement, *beyond the mere use* of the plaintiff’s name or other characteristic.”
11 *Novalogic Inc. v. Activision Blizzard* (C.D. Cal. June 18, 2013) --- F.Supp.2d ---, 2013 WL
12 8845232, at *12 (emphasis added) (quotations omitted). Noriega cannot point to any statement in
13 the game itself or in marketing for it that suggests that he endorsed or was involved in developing
14 the game.⁸ See Harvey Decl. at ¶¶ 3-6; see also Luedtke Decl. at ¶ 22 (none of 1,000+ customer
15 game reviews mention Noriega or suggest confusion that he was source for game).⁹

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17 By:

18 
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19 Attorneys for Defendants

20 _____
21 ⁸ In addition, the Noriega character appears in a small part of a fictional story centered on other
22 characters. See *Kirby*, 144 Cal.App.4th at 61 (affirming dismissal of UCL false-endorsement
23 claim given “dissimilarities” between plaintiff and videogame character). The character’s mere
24 appearance cannot suggest an endorsement to any reasonable consumer—any more than the
25 appearance of the *U.S.S. Barack Obama* in *Black Ops II* suggests a Presidential endorsement.

26 ⁹ Noriega does not and cannot allege any facts supporting a UCL claim under the “unfair” or
27 “unlawful” prongs. For the same reasons that Noriega cannot show “consumer confusion,” he
28 cannot show the required “substantial consumer injury” under the “unfair” prong. *Camacho v.*
Auto. Club of S. Cal. (2006) 142 Cal.App.4th 1394, 1403. Also, any claimed injury would be
“outweighed by countervailing benefits to consumers” in the form of protected expression. *Id.*
The UCL allows only restitution under the “unlawful” prong. *Bank of the West v. Super. Ct.*
(1992) 2 Cal.4th 1254, 1267. Where, as here, the “defendant’s action” rather than the plaintiff’s
labor “gives rise to the plaintiff’s interest in the money” claimed, there is no “vested interest
subject to restitution” compensable under the “unfair” prong of the UCL. *Pineda v. Bank of Am.,*
N.A. (2010) 50 Cal.4th 1389, 1401.